

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-1327

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM COOPER,

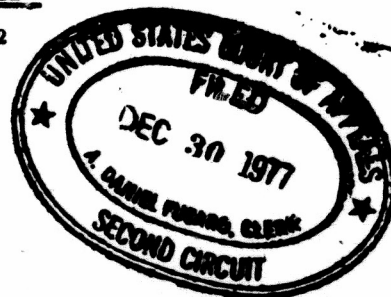
Defendant-Appellant.

PETITION FOR REHEARING
ON BEHALF OF WILLIAM COOPER
WITH SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-vs.-

77-1327

WILLIAM COOPER,

Defendant-Appellant.
-----x

1. The above-named appellant pursuant to Rules 40 and 41 (a) of the Rules of Appellate Procedure and Rules 40 and 41 of the Rules of United States Court of Appeals, Second Circuit, the Appellant is applying for a rehearing on the appeal in the above-entitled action, and a recall and/or stay of mandate, following the affirmance of his conviction, all as hereinafter explained.

STATEMENT OF THE CASE

2. The Appellant was convicted in the United States District Court (Chief Judge Mishler) under two counts of the indictment herein, charging a violation of 18 U.S.C. Sec. 2314. As a consequence, he was sentenced to two three-year jail terms to be served concurrently. He was released on bail pending the appeal to this Court, and he duly appealed to this Court. On December 19, 1977 this Court affirmed the judgment of conviction.

REASONS FOR GRANTING THE PETITION

3. A reading of the Court's opinion and/or decision compels that this application be made for the ensuing reasons:

(a) A basic consideration of the appeal was the Appellants fitness to stand trial, all of which was explored in two separate hearings had in the Court below prior to trial. It is respectfully submitted that the basic issue was whether the government met its burden to show that the Appellant was competent to stand trial. It is further submitted that initially the government had the burden to prove the Appellant's competency to stand trial. It would appear that the government did not meet the burden. While this Court held that "no persuasive claim" was made that the Appellant was unable to stand trial, the claim is now made that the record is silent as to whether the Appellant's failure to testify truthfully was the product of a considered choice as to his right of silence, or whether the Appellant was capable of testifying in his own behalf, both on direct and cross-examination. The record is silent as to this, and it is respectfully submitted that the Appellant's demeanor at trial, and considered by the trial judge, was not sufficient to support an inference that the Appellant was able to participate in the trial; See Drope v. Missouri, 420 U.S. 162 (1975), at page 177, footnote 13 as being therein stated in part that:

...although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client... an express doubt in that regard by one with closest contact with the defendant... is unquestionably a factor which should be considered...
(Omitting internal quotations and citations.)

On page 181, it was further stated that:

Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial...

The fact is that the record is completely silent as to whether the Appellant did not testify because he relied upon the right against self-incrimination, or did not testify because he could not weather due to his mental condition and due to the effects of the various sedatives he had to take, a cross-examination if he did testify. This evaluation was not made by either the trial judge or the judge who initially conducted the proceedings to test the competency of the Defendant to stand trial. The fact that the Defendant had to make this choice, and the fact that the record is completely silent as to whether he was capable of making this choice, would seem to warrant a rehearing on this appeal. It is submitted that a waiver can never be presumed from a silent record. It is further put that there is a presumption against a knowledgeable waiver from a silent record; See Von Moltke v. Gillies, 332 U.S. 708, (1948);

Johnson v. Verbst, 304 U.S. 458, (1938).

4. In connection with the aforementioned issue was the issue raised on appeal that the court charged the jury as to uncharged similar acts. The court did not caution the jury that these acts were to be considered solely as to the Appellant's intent, rather than to be the basis of an impression that the Appellant was a confirmed wrongdoer. Trial counsel apparently did not make this request and this court on the appeal, held that the failure to make the request by the Appellant's counsel was in effect a waiver. It is respectfully put to the court, that while the Appellant was not trained in law, nevertheless the issue of competency should be considered with trial counsel's omission. An alert Defendant could have consulted with counsel as to this type of evidence. It does not require any amount of erudition in law that a Defendant who's charged in two counts with certain crimes, would be competent to confer with counsel as to the court charging the jury as to uncharged crimes. Again there is silence as to this. The silence of the record was the basis for this court's holding that counsel should have excepted. Firstly, since counsel did not except, it is submitted that the Appellant was not represented at that phase of the trial and had no lawyer; secondly, because of the Appellant's condition, as argued hereinabove, a further inference can be had that because of that condition the Appellant's right to have counsel was not observed. Put another way, a person who is not competent, cannot confer with

is thereby deprived of counsel.

5. Finally, Point III of the Appellant's brief put in issue the evidentiary issue of introducing "printouts" or the products of computers. The court's opinion as to this indicated that the evidence bore out that this type of evidence was an entry made in the course of business. However, the issue was whether it was the usual course of business to make these entries or to use computers. Assuming that it was the usual course of business, nevertheless the issue remained whether the "printout" was accurate. In other words, that no foundation was laid by the government in introducing this evidence, that the computer worked. As argued in this court, the Appellant used the statement of a government witness to the effect that the computer may not have always been working or reliable. This court's opinion and/or decision indicated that there was other evidence in the area so that this evidence may have been needless. However, since there was a general jury verdict, one cannot ever know just what the jury considered in this respect. It is respectfully submitted to this court that the issue isn't that this court found evidence outside of the computer sufficient to go into the ingredient of the verdict, but what the jury considered. It is recognized that jurors are impressionable, and it may be further inferred that the jury was more impressed by the product of an automated machine than by the other evidence.

6. At all times herein, the Appellant has been at liberty on bail satisfactory to the government. No claims are made that the Appellant failed to respond to the court process requiring his appearance. The Appellant is an aged, sick and ailing person. In the event that this application is denied, the Appellant intends to apply for certiorari to the United States Supreme Court. It is stressed that the Appellant at all times met the conditions surrounding the fixation of bail.

7. No prior application has been made for the relief sought herein to this or any other court.

CONCLUSION

WHEREFORE, it is respectfully requested that the relief set forth in the annexed Notice of Motion be granted.

Respectfully submitted,

ARNOLD E. WALLACH

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of December, one thousand nine hundred and seventy-seven.

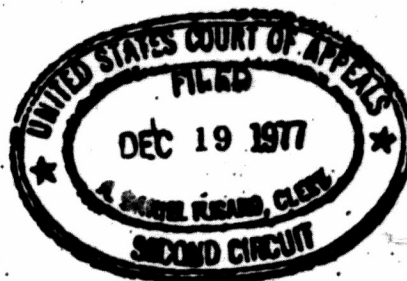
Present:

HONORABLE WILFRED FEINBERG

HONORABLE WILLIAM H. MULLIGAN

HONORABLE ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.



UNITED STATES OF AMERICA,

Appellee,

- against -

WILLIAM COOPER,

Appellant.

77-1327

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

This is an appeal by William Cooper from a conviction on two counts of interstate transmission of forged checks, after a jury trial before Judge Mishler of the United States District Court for the Eastern District of New York. Appellant's first contention goes to the trial judge's failure to instruct the jury concerning the limited relevance of so-called "similar acts" testimony. While such an instruction should have been given, its inadvertent omission under the circumstances did not constitute plain error. Appellant did not object to the charge that was given, and he does not dispute the sufficiency of the evidence introduced to prove the crimes charged in the indictment.

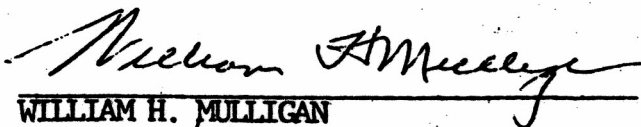
Appellant also objects to having been ordered to proceed to trial despite the reports by two physicians that his physical condition was poor. But appellant makes no persuasive claim that any specific aspect of his defense at trial was hampered by his condition, and we find no abuse of discretion in letting the case go forward after a three year delay following the indictment.

Finally, appellant argues that the admission of a computer printout listing his business's check transactions was reversible error, since no proper foundation was laid. But the government established that the printout consisted of entries routinely

made in the regular course of business, and it was not obligated to introduce in addition testimony as to how the computer functioned. In any case, the information in the printout was verified by other bank records admitted in evidence at trial and not challenged in this appeal.

The judgment of conviction is affirmed.


WILFRED FEINBERG


WILLIAM H. MULLIGAN


ELLSWORTH A. VAN GRAAFEILAND

| Circuit Judges

WALLACH

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10312. That on the 30 day of Dec. 1977 deponent served the within Petition upon

U.S. Atty. East. Dist. of NY and
Mr. Crecittelli, U.S. Atty., ex

attorney(s) for
Appellee

In this action, at
Dept. of Justice, Box 895, Washington, Dc.

the address(es) designated by said attorney(s) for that purpose by depositing
3 _____ copies of same enclosed in a postpaid properly addressed wrapper, in an
official depository under the exclusive care and custody of the United States
post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 30 day
of Dec. , 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

